

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
[www.montgomerycountymd.gov/content/council/boa/index.asp](http://www.montgomerycountymd.gov/content/council/boa/index.asp)

(240) 777-6600

**Case No. A-6427**

PETITION OF PETER M. FLECK

OPINION OF THE BOARD  
(Opinion Adopted March 5, 2014)  
(Effective Date of Opinion: March 24, 2014)

Case No. A-6427 is an application for variance for an existing one-story room addition. The addition requires a six (6) foot variance as it is within fourteen (14) feet of the rear lot line. The required setback is twenty (20) feet, in accordance with Section 59-C-1.323(b)(2).

The Board of Appeals held a hearing on the application on March 5, 2014. Peter M. Fleck appeared and testified.

Decision of the Board: Requested Variance **Denied**.

**EVIDENCE PRESENTED**

1. The subject property is Lot 1, Block 15, Veirs Mill Village Subdivision, located at 4200 Garrett Park Road, Silver Spring, Maryland, 20906, in the R-60 Zone.

2. Mr. Fleck testified that the subject property is a corner lot. He stated that the lot is larger than other lots around it and that the topography is flat. The record reflects that the lot contains 6,790 square feet. [See Exhibit No. 4(b)]. Mr. Fleck stated that he renovated the entire house, and that the addition provides a needed eating area. He stated that he believes the structure fits nicely between the house and the detached garage, and that the neighbors do not object to the addition. He stated that he was not aware of the setback requirement.

In response to a Board question, Mr. Fleck admitted that the construction was done without a building permit from Montgomery County despite the fact that he employed a licensed contractor to do it.

## FINDINGS OF THE BOARD

1. A variance permits a structure that otherwise would not be permitted by the zoning ordinance, which has led the Maryland Court of Special Appeals to clarify that "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances," *Cromwell v. Ward*, 102 Md. App. 691, 703, 651 A.2d 424, 430 (1995) (citation omitted). Review of a variance application under an ordinance like Montgomery County's involves a two-step process to discern a unique characteristic of the property and then to determine whether a practical difficulty results from the uniqueness of the property:

The first step requires a finding that the property whereon structures are to be placed (or uses conducted) is -- in and of itself -- unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provision to impact disproportionately upon that property. Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship. If that first step results in a supportable finding of uniqueness or unusualness, then a second step is taken in the process, i.e. a determination of whether practical difficulty and/or unreasonable hardship, resulting from the disproportionate impact of the ordinance caused by the property's uniqueness, exists.

*Cromwell*, 102 Md. App. at 694-695, 651 A.2d at 426. That the variance might allow an improvement to property that is "suitable or desirable or could do no harm or would be convenient or profitable to its owner" does not provide a basis for granting a variance. *Cromwell*, 102 Md. App. at 707, 651 A.2d at 432. The need for the variance must arise from the application of the zoning ordinance to the unique or peculiar characteristics of the property. See *Cromwell*, 102 Md. App. at 717-718, 651 A.2d at 437. The zoning ordinance must impact upon the land in a unique manner that does not exist where a restriction applies "equally to all lots of similar size." *Cromwell*, 102 Md. App. at 720, 651 A.2d at 438.

2. Section 59-G-3.1 of the Montgomery County Zoning Ordinance ("Authority – Board of Appeals") provides that the Board of Appeals may grant petitions for variances as authorized in Section 59-A-4.11(b) upon proof by a preponderance of the evidence that:

- (a) By reason of exceptional narrowness, shallowness, shape, topographical conditions or other extraordinary situations or conditions peculiar to a specific parcel of property, the strict application of these regulations would result in peculiar or unusual practical difficulties to, or exceptional or undue hardship upon, the owner of such property;
- (b) Such variance is the minimum reasonably necessary to overcome the aforesaid exceptional conditions;
- (c) Such variance can be granted without substantial impairment to the intent, purpose and integrity of the general plan or any duly adopted and approved area master plan affecting the subject property; and
- (d) Such variance will not be detrimental to the use and enjoyment of adjoining or neighboring properties. These provisions, however, shall not permit the Board to grant any variance to any setback or yard requirements for property zoned for commercial or industrial purposes when such property abuts or immediately adjoins any property zoned for residential purposes unless such residential property is proposed for commercial or industrial use on an adopted master plan. These provisions shall not be construed to permit the Board, under the guise of a variance, to authorize a use of land not otherwise permitted.

It is under the first subsection that the Board must employ the analysis from the *Cromwell* case, set forth above. There is no evidence that any unique feature of the lot constrains construction on it, in fact Mr. Fleck testified that the lot is flat and larger than others around it. Thus, the property is not "unique, unusual, or different" from properties around it. The Board understands that the homeowner sought a practical solution to the need for eating space in the house, and finds it unfortunate that the construction circumvented the building permit process which might have brought to light the setback requirements before the addition was built. But the fact that the addition was built without regard to the required setback does not create a unique characteristic of the property that justifies granting a variance. Because the application does not meet the threshold requirements of Section 59-G-3.1(a), the variance must be denied.

Because the application does not meet the threshold requirements of Section 59-G-3.1(a), the Board did not consider its conformance with subsections (b)-(d).

On a motion by David K. Perdue, Vice-Chair, seconded by Carolyn J. Shawaker, with Stanley B. Boyd, John H. Pentecost and Catherine G. Titus, Chair, in agreement the Board adopted the following Resolution:

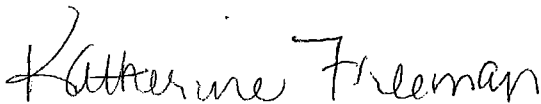
**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



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Catherine G. Titus  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 24<sup>th</sup> day of March, 2014.



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Katherine Freeman  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.